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6 **UNITED STATES DISTRICT COURT**
7 **NORTHERN DISTRICT OF CALIFORNIA**
8 **SAN FRANCISCO DIVISION**
9

10 UNITED STATES OF AMERICA,

11 Plaintiff,

12 v.

13 AURORA MARIN,

14 Defendant.
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Case No. 13-cr-00121 JST (NC)

**Order of Release on Conditions
Under 18 U.S.C. § 3142(c)**

18 This Court held a detention hearing for Aurora Marin under 18 U.S.C. § 3142(f)
19 on March 11, 18, and 22, 2013. Marin is charged by indictment with conspiracy to
20 possess and possession with intent to distribute methamphetamine. This Order of
21 Release specifies a combination of release conditions under the Bail Reform Act.

22 **PROCEDURAL HISTORY**

23 The Court first ordered Marin's temporary detention under 18 U.S.C. § 3142(d)
24 based on a determination that she was, at the time of the alleged offense, not a U.S.
25 citizen or lawfully admitted resident and might flee. The government moved for
26 detention, asserting that Marin posed a risk of non-appearance and a danger to the
27 community if released. The government also proffered that an immigration detainer had
28 been lodged against Marin and asserted that if the Court ordered her release, then the
U.S. immigration authorities would immediately remove her from the U.S. to Mexico.

1 Shortly after entering federal custody, Marin gave birth to a son, who is now in
2 the custody of Marin's boyfriend, Hamilton Rodas, and her daughter, Leslie Aurora-
3 Marin.

4 The detention hearing was preceded by a Pretrial Services report prepared March
5 8, 2013. On March 11 and 18, the Court suggested that it was considering the release of
6 Marin but needed more information on (i) immigration consequences, and (ii) possible
7 sureties, so Pretrial Services prepared an addendum on March 20. The parties filed
8 briefs in favor of and opposed to pretrial release. Dkt. Nos. 22, 23.

9 Pretrial Services ultimately recommended that the defendant be detained due to a
10 risk of non-appearance but also proposed release conditions if Marin's immigration
11 detainer were resolved, and additional bail resources became available. At the March 22
12 hearing, Pretrial Services Officer Allen Lew recommended that if the Court ordered
13 Marin released with the recommended conditions (including two sureties and a
14 custodian, with LMON electronic monitoring) then an appropriate bond amount would
15 be \$50,000. The government, while requesting that Marin be detained, did not object to
16 the bond amount or to the specified conditions.

17 This Order sets forth this Court's analysis of the factors to be considered under
18 the Bail Reform Act as to whether there are "conditions of release that will reasonably
19 assure the appearance of the person as required and the safety of any other person and
20 the community." 18 U.S.C. § 3142(g). As set forth below, this Court finds that the
21 combination of conditions stated in the March 20 Pretrial Services addendum constitutes
22 the "least restrictive" conditions that will reasonably assure the future appearances of
23 Marin and the safety of any other person and the community. 18 U.S.C. § 3142(c)(1)(B).
24 Accordingly, this Court orders that Marin be released on a \$50,000 unsecured bond, with
25 two sureties (Jose Diaz-Cuevas and Hamilton Rodas) and a custodian (her daughter,
26 Leslie Aurora-Marin) and subject to standard conditions of release, plus the combination
27 of special conditions set forth at the end of this Order.

1 ANALYSIS OF BAIL FACTORS UNDER § 3142(g)

2 In evaluating whether a person charged with an offense should be detained,
3 released, or released on conditions, the Court must take into account available
4 information concerning: (1) the nature and circumstances of the charged offense; (2) the
5 weight of the evidence; (3) the history and characteristics of the person; and (4) the
6 nature and seriousness of the danger to any person or the community that would be
7 posed by the person's release. 18 U.S.C. § 3142(g).

8 A finding that a defendant is a danger to the community must be supported by
9 clear and convincing evidence. A finding that a defendant is a flight risk must be
10 supported by a preponderance of the evidence. 18 U.S.C. § 3142(f); *United States v.*
11 *Motamedi*, 767 F.2d 1403, 1408 (9th Cir. 1985).

12 Here, Marin is charged by indictment with two felony counts under the Controlled
13 Substances Act, for conspiracy to possess with intent to distribute 50 grams or more of
14 methamphetamine, and possession with intent to distribute 50 grams or more of
15 methamphetamine. As each of these charges is an offense for which the maximum term
16 of imprisonment is ten years or more, it shall be "presumed," subject to rebuttal by the
17 defendant, that no condition or combination of conditions of release will "reasonably
18 assure" future appearances of Marin and assure the "safety of any other person or the
19 community." 18 U.S.C. § 3142(e)(3).

20 In this case, the government asserts that there is no combination of conditions of
21 release that would "reasonably assure" future appearances of Marin and assure the
22 "safety of any other person or the community." On the other hand, Marin asserts that a
23 significant bond with two sureties, a custodian, and electronic monitoring, can
24 reasonably assure her appearance and the community's safety.

25 IMPACT OF IMMIGRATION DETAINER

26 As a preliminary question, the Court considers whether it has discretion to release
27 Marin, given that she is a citizen of Mexico and that the executive branch of the U.S.
28 government, through Immigration and Customs Enforcement (ICE), has lodged an
immigration detainer against her release. The District Court of Oregon recently

1 addressed this issue thoroughly in *United States v. Trujillo-Alvarez*, No. 12-cr-00469 SI,
2 2012 WL 5295854 (D. Or. Oct. 29, 2012). That Court, after examining the language and
3 history of the Bail Reform Act, determined that “persons who are not citizens must be
4 treated under the BRA like all other persons charged with an offense.” 2012 WL
5 5295854, at *5. This Court agrees. Furthermore, this Court agrees that there is no
6 prohibition on pretrial release created by the filing of an immigration detainer. *Id.* at *8.
7 Rather, this Court must perform its detention or release analysis on a case-by-case basis
8 depending on the facts of each case.

9 Finally, this Court, like the Court in *Trujillo-Alvarez*, concludes that the analysis
10 of “failure to appear” as used in the Bail Reform Act is limited to the risk that the
11 defendant may flee or abscond, that is, fail to appear by her own volition. If the
12 government *prevents* a defendant’s appearance, for example, by removing her from the
13 country, that defendant has not “failed to appear” for purposes of violating the bail act.
14 *Id.* at *8 (citing *United States v. Montoya-Vasquez*, No. 4:08-cr-3174, 2009 WL 103596
15 (D. Neb. Jan. 13, 2009)).

16 In sum, the Court concludes that it does have the discretion under the Bail Reform
17 Act to assess whether Marin should be detained or released, despite the lodging of an
18 immigration detainer.

19 1. Nature and Circumstances of the Offense

20 As set forth in the government’s motion for detention, Dkt. No. 22 at 2-3, Marin
21 was arrested on October 23, 2012, after a buy-bust operation that resulted in law
22 enforcement officers seizing 884.1 grams of suspected methamphetamine. The
23 government alleges that during the buy-bust, Marin handed a bag containing the drugs to
24 a co-defendant, for sale to a confidential source (CS) working with law enforcement.

25 Of note, there were methamphetamine sales to the CS from co-defendant Silva in
26 smaller quantities on October 4 and October 12, 2012. This fact pattern could form the
27 basis of a sentencing entrapment defense, but the Court does not need to resolve that
28 question for purposes of determining detention or release. *See United States v. Mejia*,
559 F.3d 1113, 1118 (9th Cir. 2009) (Sentencing entrapment “occurs when a defendant

1 is predisposed to commit a lesser crime, but is entrapped by the government into
2 committing a crime subject to more severe punishment.”).

3 The government does not allege that guns were possessed by any of the
4 defendants involved in the October 2012 drug transactions. No violence or threats of
5 violence are alleged.

6 2. Weight of the Evidence

7 The weight of the evidence is the least important factor if argued as a basis to
8 detain a defendant, in that Marin is presumed innocent. *Motamedi*, 767 F.2d at 1408.
9 Here, the government asserts that it has “overwhelming” evidence that Marin possessed
10 the bag that contained methamphetamine during the buy-bust. Dkt. No. 22 at 3. Agents
11 recovered the methamphetamine and assert that they saw Marin holding and passing the
12 bag shortly before the arrest. Less obvious is how the government will prove Marin
13 knew what was in the bag and what her role in the offense was.

14 3. History and Characteristics of the Defendant

15 The most important factor in this case is Marin’s physical and mental condition.
16 Marin gave birth to a child approximately two weeks ago while in custody. That child is
17 now being cared for by her boyfriend and her 19-year-old daughter. Marin has three
18 other dependent children, ages 6, 15, and 16, who lived with her in Windsor before her
19 arrest and are awaiting her return.

20 The government argues that Marin will take her infant and escape to Mexico if
21 released. The Court finds that the weight of the available evidence tilts against this
22 argument. Marin has lived in this country since 1987 and has spent 25 of her 41 years
23 here. Her family is here. She has returned here from her native Mexico even after being
24 removed by immigration authorities, and upon risk of being imprisoned for doing so.

25 Of concern to the Court are Marin’s prior felony drug convictions, use of aliases
26 and fake identification, and a lack of verifiable employment.

27 On balance, however, the Court finds that Marin’s physical and mental condition
28 rebuts the presumption of detention and indicates that she may be released in the interest
of justice, with stringent conditions, without jeopardizing community safety.

1 4. Danger to the Community

2 There is no question that methamphetamine use is harmful to the community.
3 There should be serious debate, however, as to whether mass incarceration and family-
4 splitting deportations are an effective and fair deterrent to drug use. *See, e.g.*, Michelle
5 Alexander, *The New Jim Crow: Mass Incarceration in the Age of Colorblindness* (New
6 Press, 2010); *The House I Live In*, directed by Eugene Jarecki (film, 2012).

7 Here, the alleged offense does not involve violence or the threat of violence. And
8 there is no history of violence by the defendant. The Court finds that Marin's danger,
9 viewed in combination with all the other bail factors, can be reasonably mitigated by the
10 combination of release conditions ordered.

11 SPECIAL CONDITIONS OF RELEASE

12 1. The defendant shall reside at the specified address of her custodian in
13 Windsor, California, where she shall be supervised by Leslie Aurora-Marin, subject to
14 LMON electronic monitoring. Marin may leave home only for court purposes, attorney
15 visits, medical appointments, and as directed by Pretrial Services.

16 2. The defendant's travel shall be restricted to the Northern District of California.

17 3. The defendant shall surrender all passports to Pretrial Services and shall not
18 apply for any passports or other travel documents.

19 4. The defendant shall not possess any firearm, destructive device, or other
20 dangerous weapon.

21 5. The defendant shall not use alcohol, and shall not use or possess any controlled
22 substance without a legal prescription.

23 6. The defendant shall have no contact with co-defendants outside the presence
24 of counsel.

25 7. The defendant shall not change residence without prior approval of Pretrial
26 Services.

27 8. The defendant shall report to Pretrial Services in San Francisco upon release.
28 Pretrial Services will coordinate the connection of the LMON monitoring.

1 The Court advised Marin, her sureties, and her custodian, of these conditions and
2 the consequences for a failure to abide by the conditions, as required by 18 U.S.C. §
3 3142(h). These conditions and consequences were translated into Spanish. The
4 complete conditions are set forth in a bond form signed by Marin, her sureties, and her
5 custodian.

6 TEMPORARY STAY

7 This release order is stayed until 6:30 p.m. on March 22, 2013, or until further
8 Court order. A stay will enable the parties to appeal.

9 Finally, this Order does not reach the ultimate question posed by *Trujillo-Alvarez*:
10 whether the executive branch must dismiss a criminal case with prejudice when the
11 immigration authorities remove a defendant from the District during the prosecution of
12 the case. 2012 WL 5295854, at *12. “Whether grounded in the Sixth Amendment’s
13 guarantee of compulsory process or in the more general Fifth Amendment guarantee of
14 due process, the Constitution guarantees criminal defendants a meaningful opportunity to
15 present a complete defense.” *United States v. Leal-Del Carmen*, 697 F.3d 964, 969 (9th
16 Cir. 2012), quoting *United States v. Stever*, 603 F.3d 747, 755 (9th Cir. 2010). If Marin
17 could give exculpatory evidence, the government may undermine the opportunity of
18 Marin and her co-defendants to present a complete defense by removing her from the
19 country. That question remains open in this case.

20 IT IS SO ORDERED.

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22 DATE: March 22, 2013

23 
24 NATHANAEL M. COUSINS
25 United States Magistrate Judge
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